

Central Distributors, Inc. and Truck Drivers, Warehousemen & Helpers Union Local No. 340, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
Cases 1-CA-19718 and 1-RC-17384

21 June 1983

**SUPPLEMENTAL DECISION, ORDER,
AND DIRECTION OF SECOND
ELECTION**

**BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER**

On 22 January 1982 Truck Drivers, Warehousemen & Helpers Union Local No. 340, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein the Union, was certified in Case 1-RC-17384 as the exclusive bargaining representative of employees in a unit of all full-time and regular part-time drivers, warehousemen, wine packers, forklift driver, and mechanic employed at Respondent's Lewiston, Maine, location. Respondent refused to bargain with the Union maintaining that the certification was invalid. The Union consequently filed a charge upon which the Regional Director for Region 1 issued a complaint alleging that Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by its refusal to bargain. Thereafter, the General Counsel filed a Motion for Summary Judgment which was granted by the Board on 16 September 1982.¹

The Board has decided *sua sponte* to reconsider its decision in that case as well as the underlying representation case. It does so in light of the statements issued by Respondent in support of its objection in Case 1-RC-17384 and its response to the Notice To Show Cause in the summary judgment proceeding as well as the entire record in these proceedings.²

It has been and continues to be the policy of the Board to evaluate alleged objectionable conduct in representation elections by considering the circumstances of the election and attaching no importance to events occurring subsequent to the election.³ In deciding the instant cases, the Board focused on a postelection event and reached an outcome inconsistent with its long-standing policy. It is that inconsistency which prompts this reconsideration.

On 11 September 1982, the day of the election, a driver, Gerald Whalen, was disenfranchised when

he was delayed in the normal course of his duties and was unable to return before the polls closed. In its objections, the Employer sought to have the election rerun as Whalen's vote was determinative. Following the Regional Director's investigation but prior to the issuance of his decision, Gerald Whalen died. The Regional Director acknowledged the legitimacy of the Employer's position, but focusing on the identity of the disenfranchised voter, he determined that the election results should stand as Whalen himself could not cast a ballot in a new election. The Board adopted the Regional Director's report without comment, and subsequently granted the General Counsel's Motion for Summary Judgment. While the Board acknowledged that in *Yerges Van Liners*, 162 NLRB 1259 (1967), and, more recently, in *Glenn McClendon Trucking Co.*, 255 NLRB 1304 (1981), in normal circumstances an election must be rerun where a voter is improperly disenfranchised, it found the postelection death of the disenfranchised voter to be controlling. However, this decision was inconsistent with the long-standing policy of refusing to consider postelection events in the determination of objectionable conduct.

The purpose of setting aside an improperly run election is to give all the employees currently employed in unit positions an opportunity to vote, whether for the first or second time. A change in the identity of the eligible voters, whether by virtue of turnover, layoff, discharge, or, as here, death, merely affects the composition of the voting group.⁴ It does not alter the fact that on the day of the original election a voter was improperly disenfranchised and thus the election result could not stand. Thus, what happens to a disenfranchised voter after the election is immaterial.⁵ In this case, therefore, although the deceased employee cannot now vote, his replacement, if any, may vote and is entitled to exercise the franchise.⁶

Accordingly, we shall rescind the Decision and Order issued in Case 1-CA-19718 and the Decision issued in Case 1-RC-17384, revoke the Union's

⁴ Alterations or turnover in the employee complement after an election cannot normally serve to affect an election result. See, for example, *Orleans Storage Co.*, 123 NLRB 1757, 1758 (1959) (complete turnover in unit after election but before certification cannot void election result).

⁵ As the court stated in *NLRB v. New England Lithograph Co.*, 589 F.2d 29, 37 (1st Cir. 1978) summarizing Board law:

... what actually happens after the election is of minimal consequence. The Board focuses on the period including the eligibility date and the election date and bases its conclusion on that time span. Post-critical date information cannot be used to color the facts of the case as they stood on the critical date.

⁶ In a rerun election, a new voting eligibility list based on a current payroll is used, rather than the payroll used in the first election. See *Socony-Vacuum Oil Co.*, 84 NLRB 969, 970 (1949).

¹ 263 NLRB 1106.

² As discussed herein the Board has decided to reopen the proceedings in Case 1-RC-17384. Accordingly, in order to effectuate the purposes of the Act and to avoid unnecessary costs and delay, Cases 1-CA-19718 and 1-RC-17384 are hereby consolidated.

³ *Farmers Rendering Co.*, 115 NLRB 1014 (1956).

certification in the latter case, and direct a second election to be conducted therein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby rescinds the Decision and Order issued in Case 1-CA-19718 and the Decision issued in Case 1-RC-17384, and revokes the certifi-

cation of 22 January 1982 issued in Case 1-RC-17384.

IT IS FURTHER ORDERED that the election previously conducted in Case 1-RC-17384 on 11 September 1982 be, and it hereby is, set aside and that a second election be held pursuant to the following direction.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]